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12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF NEVADA**

14 SHUFFLE MASTER, INC.

15 Plaintiff,

16 v.

17 YEHIA AWADA, and GAMING
18 ENTERTAINMENT, INC.

19 Defendants.

20 GAMING ENTERTAINMENT, INC., and
21 YEHIA AWADA,

22 Counterclaim-Plaintiffs,

23 v.

24 SHUFFLE MASTER, INC., and MARK
25 YOSELOFF,

26 Counterclaim-Defendants.

CASE NO. CV-S-05-1112-RCJ-RJJ

EFILE

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
SHUFFLE MASTER'S MOTION FOR
PRELIMINARY INJUNCTION**

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1 **I. INTRODUCTION**

2 Plaintiff Shuffle Master, Inc. (“Shuffle Master”) is an undisputed innovator and
3 leader in the field of specialty casino table games. In early September, 2005, at the G2E
4 Gaming Convention at the Las Vegas Convention Center, Defendant Yehia Awada
5 (“Awada”) and his corporate alter-ego, Defendant Gaming Entertainment, Inc. (“GEI”)
6 unveiled a “new and improved” version of their Play Four Poker game that was nothing
7 more than a blatant copy of one of Shuffle Master’s most popular games, Four Card
8 Poker. Although imitation is often cited as a form of flattery, Shuffle Master was not
9 pleased by the “compliment.” Thus, on September 12, 2005, Shuffle Master moved this
10 Court for a Temporary Restraining Order (“TRO”) to stop Awada and GEI (together the
11 “Defendants”) from copying Shuffle Master’s trade dress in the appearance of the felt for
12 the Four Card Poker table game. On September 14, 2005 this Court entered the requested
13 TRO, temporarily enjoining Defendants from marketing their copycat game. The TRO
14 remains in effect by a stipulation of the parties, approved by the Court.
15

16 Shuffle Master now seeks a preliminary injunction—limited but essential relief.
17 For nearly four years, Shuffle Master has been the exclusive user of the distinctive trade
18 dress embodied by its well-known Four Card Poker game. Shuffle Master will be
19 irreparably harmed if Defendants are allowed to offer a game with a virtually identical
20 appearance in the marketplace. In contrast, Defendants will suffer *no* harm if the status
21 quo is maintained, because they are easily able to alter the appearance of their game so
22 that it is not confusingly similar to Shuffle Master’s trade dress. Indeed, from 2002 until
23 approximately August 2005, Defendants marketed a version of their “Play Four Poker,”
24 that did not use Shuffle Master’s trade dress or trademarks. More importantly, *as soon*
25
26
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1 as this Court entered Shuffle Master's requested TRO, at the G2E Convention,
2 Defendants revealed yet another version of their Play Four Poker felt that did not use
3 Shuffle Master's trade dress or trademarks.

4 As Shuffle Master explains below and will further demonstrate at the preliminary
5 injunction hearing, the Court should grant Shuffle Master's motion under basic and
6 uncontroverted principals of trademark law as applied to the facts of this case.
7

8 **II. BACKGROUND FACTS**

9 **A. The Four Card Poker Trade Dress.**

10 Four Card Poker debuted in January of 2002. In construction, the game consists
11 of a felt overlay that is placed atop a standard semi-circular casino gaming table. During
12 play, the dealer stands behind the straight edge of the semi-circle, and the players sit
13 along its circumference. The game begins with each player making an initial "ante" bet;
14 the players also have the option to add a side bet, for which Shuffle Master has coined the
15 trademark "Aces Up." Five cards are then dealt to each player, and once a player obtains
16 his cards, he may add a second bet in an amount one to three times the ante. The object
17 of the game is to make the best four-card hand out of five cards. These game play rules
18 and the side Aces Up bet option for Four Card Poker have remained exactly the same
19 since the inception of the game. Ex. A, TRO Snow Aff. ¶4.
20
21

22 The Four Card Poker felt design is comprised of a number of distinctive visual
23 features, including (1) the placement of three circles, arranged vertically, representing the
24 location to place the various bets, at each player station; (2) the font within the three
25 circles at each player station; (3) the printing of the names of the bets within the three
26 circles at each player station, so that the letters of "Aces Up" and "Play 1x to 3x Ante"
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1 touch the outer edges of the circles; (4) the identification of the bets, as “Aces Up,”
 2 “Ante,” and “Play 1x to 3x Ante” at each player station; (5) the placement of the pay
 3 tables at each player station beneath the vertically arranged circles; (6) the font of the
 4 “Aces Up” trademark at each player station; (7) the number of dots (eighteen) below the
 5 “Aces Up” trademark at each player station; (8) the font of the “Automatic Bonus”
 6 heading at the pay table for each player station; (9) the number of dots (eighteen) below
 7 “Automatic Bonus” at each player station; and (10) the font and wording of the text
 8 below the pay table at each player station (“Automatic Bonuses paid on Ante wager”).
 9
 10 Ex. B, Snow Aff. ¶ 7.

11 The overall appearance of these individual design components in combination—
 12 which is in no way dictated by the rules of play—makes up the “Four Card Poker Trade
 13 Dress.” There are numerous alternate table game felt designs on the market. However,
 14 with the exception of the Revised Awada Game, Shuffle Master is aware of no table
 15 game felt designs that look just like the Four Card Poker Trade Dress. Ex. C, Scott Aff.
 16 ¶¶ 6, 7. Indeed, Shuffle Master’s Four Card Poker Trade Dress is inherently distinctive
 17 and has come to be associated with Shuffle Master exclusively. Ex. D, TRO Gatlin Aff.
 18 ¶ 4 (observing that Four Card Poker is “well known among casinos in Nevada” and
 19 “associated” with Shuffle Master).
 20
 21

22 **B. Shuffle Master’s Successful Placement Of Four Card Poker On** 23 **Casino Floors.**

24 Shuffle Master provides an array of table games choices to its casino customers
 25 who pay a monthly fee for leasing such games and then place the games on their casino
 26 floors. Ex. C, Scott Aff. ¶ 3. Placing a table game, such as Four Card Poker, on a casino
 27
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1 floor is not the end of the process. Casinos will maintain only the most popular, as well
2 as profitable, games on their gaming floors. The turnover level for table games is high
3 due to the fact that all of Shuffle Master's placements are made on a 30-day lease basis.
4 If a game does not perform successfully for the casino, then there is a good chance that it
5 will be removed. Ex. C, Scott Aff. ¶ 4. Not surprisingly, competition to obtain and
6 maintain placements on casino floors is fierce among those in the gaming business.
7 Shuffle Master considers itself in competition for casino floor space with any other
8 product that can take up that same floor space, whether it be other specialty table games
9 or slot machines. The bottom line is that there are many options available to casino table
10 game managers who are looking to fill their floor space, and Shuffle Master strives to be
11 the best option by providing popular table games like Four Card Poker. Ex. C, Scott Aff.
12 ¶ 5.
13

14
15 Notwithstanding this competitiveness, the Four Card Poker table game is and has
16 been overwhelmingly popular: Shuffle Master currently has approximately 230
17 placements of the game in casinos around the United States and abroad. Ex. A, TRO
18 Snow Aff. ¶¶ 18-19; Ex. C, Scott Aff. ¶¶ 8, 9. That number is significant. For example,
19 by comparison, the game Casino War has been in the market for roughly 8 years and has
20 only 50 installs. Ex. C, Scott Aff. ¶ 8. Four Card Poker is and has been a very profitable
21 game for Shuffle Master. Four Card Poker is the fourth highest income generating
22 specialty table game for Shuffle Master and the fourth table game in the history of the
23 business that is not a side bet or blackjack derivative to reach 200 or more installs. Ex.
24 C, Scott Aff. ¶ 9.
25
26
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1 **C. Shuffle Master Has Spent Significant Time And Money Advertising**
2 **and Promoting The Four Card Poker Trade Dress.**

3 Since 2002, Shuffle Master has continuously advertised and promoted the Four
4 Card Poker Trade Dress in four distinct ways. *First*, Shuffle Master participates in
5 numerous gaming trade shows held throughout the United States, where it holds live
6 demonstrations, displays posters depicting the Four Card Poker Trade Dress, and engages
7 in media coverage and show-specific advertising, targeted to the audience attending the
8 trade show. Ex. E, Clark Aff. ¶ 3. Shuffle Master also furnishes show attendees with a
9 wide range of print marketing materials related to Four Card Poker, including rack cards
10 (instructional 4" by 9" cards provided to casinos for player distribution), sell sheets
11 (detailed product information sheets containing the game paytables, sample layout, and
12 rules of play), brochures, and fliers with up-to-date installation numbers. The printed
13 materials highlight the Four Card Poker logo as well as the Four Card Poker Trade Dress,
14 and, along with the live demonstrations and presentations, help to reinforce to attendees
15 that Shuffle Master is the exclusive source of the Four Card Poker table game.
16

17 *Second*, separate and apart from its trade show appearances, Shuffle Master
18 specifically targets individual key casino personnel, including table games managers and
19 dealers, to stimulate interest in the Four Card Poker table game. Ex. E, Clark Aff. ¶ 3.
20 Shuffle Master makes promotional sales calls throughout the year to such casino
21 employees, and provides them with the same variety of Four Card Poker print marketing
22 materials made available at industry trade shows. Ex. E, Clark Aff. ¶ 4.
23

24 *Third*, Shuffle Master markets and promotes the Four Card Poker table game
25 electronically. Shuffle Master's corporate website (located at URL
26
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1 <http://www.shufflemaster.com>) contains detailed information about the game and allows
2 internet users to download both the game sell sheet and a trial version of Four Card Poker
3 computer game software. Ex. E, Clark Aff. ¶ 15. Shuffle Master has also developed an
4 interactive “postcard” for the Four Card Poker table game, designed to educate current
5 and potential customers as to the specific features of the game. This electronic postcard
6 includes an animated instruction on the rules of play, and is sent directly to customers by
7 Shuffle Master’s sales and marketing executives. Both the website and the e-postcard
8 prominently feature the distinctive Four Card Poker Trade Dress. Ex. E, Clark Aff. ¶¶
9 15-16.
10

11 **Fourth**, Shuffle Master markets the Four Card Poker table game through gaming
12 industry publications. Shuffle Master consistently releases information on the Four Card
13 Poker table game to trade media, resulting in ample editorial coverage of the game.
14 These press releases are supported with professional photographs of the distinctive Four
15 Card Poker Trade Dress (provided to the media upon request) to generate awareness and
16 recognition of the game, and of Shuffle Master as the source of the game. Ex. E, Clark
17 Aff. ¶¶ 17-18. Since November 1, 2004, Shuffle Master has also placed paid
18 advertisements in trade publications such as *Casino Enterprise Management* and
19 *Mississippi Gaming News* that showcase the Four Card Poker logo and include
20 photographs highlighting the Four Card Poker Trade Dress. Ex. E, Clark Aff. ¶¶ 7, 10.
21

22 These four types of marketing and promotion have resulted in significant
23 expenditures of time and money by Shuffle Master. For fiscal year 2005 alone, Shuffle
24 Master spent nearly \$30,000 in advertising and promoting Four Card Poker. Ex. E, Clark
25 Aff. ¶ 19. But the costs incurred in promoting the Four Card Poker table game have been
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1 fruitful, as it is one of Shuffle Master's most popular and successful games both in the
2 United States and abroad. Ex. A, TRO Snow Aff. ¶¶ 18-19; Ex. C, Scott Aff. ¶¶ 8, 9.
3 Gaming industry members recognize the Four Card Poker Trade Dress as emanating from
4 a single source, namely Shuffle Master. Ex. F, Ostberg Dec. pp. 9, 10; Ex. D, TRO
5 Gatlin Aff. ¶ 4 (observing that Four Card Poker is "well known among casinos in
6 Nevada" and "associated" with Shuffle Master).
7

8 **D. The Defendants' Copycat Play Four Poker Game.**

9 Like Shuffle Master, Defendants are in the business of developing and marketing
10 specialty casino games, including table games. See Docket Entry No. 26, Defendants'
11 Answer to First Amended Complaint and Counterclaim ("Counterclaim") at
12 Counterclaim ¶ 7.
13

14 In 2002, Defendants began distributing a table game known as "Play Four Poker"
15 (the "Original Awada Game"). Any similarity between the Original Awada Game and
16 Shuffle Master's Four Card Poker table game began and ended with the fact that both
17 games involved bets based on a four card hand of poker. The Original Awada Game had
18 very different rules of play and a very different overall appearance from Shuffle Master's
19 Four Card Poker. Ex. A, TRO Snow Aff. ¶¶ 7, 13-17.
20

21 In August 2005 Defendants suddenly and significantly revised their Play Four
22 Poker game, such that both its rules of play and its table appearance became *identical* to
23 Shuffle Master's Four Card Poker (the "Revised Awada Game"). Ex. A, TRO Snow Aff.
24 ¶ 7, 13-17. See generally Ex. G, TRO Conaway Aff. (attaching photographs of Revised
25 Awada game from G2E). Although Defendants have no marketing plan, they have
26 admitted that they intend "to market the [Revised Awada] game anywhere that there is
27
28

1 casino table gaming.” Ex. J, Defendants’ Responses to Shuffle Master’s First
2 Interrogatories No. 4; Ex. K, Defendants’ Response to Shuffle Master’s First Requests
3 for Production No. 7.

4 The only plausible explanation for the change to the Original Awada Game is that
5 Defendants intended to capitalize on the popularity and success earned by Shuffle
6 Master’s Four Card Poker game over the last four years. Hoping to siphon casino
7 business away from Shuffle Master, the Defendants have touted the Revised Awada
8 Game as a cheaper version of Shuffle Master’s Four Card Poker—at the G2E
9 Convention, Defendants boldly displayed promotional materials asking “WHY PAY
10 MORE?” and hyped that their game was less expensive than Shuffle Master’s. Ex. H,
11 Conaway Aff. ¶¶ 4, 5.

12 Defendants do not need to imitate the Four Card Poker Trade Dress. As an initial
13 matter, Defendants sold a Play Four Poker game for years without using the Four Card
14 Poker Trade Dress. Moreover, immediately upon entry of this Court’s TRO, Defendants
15 appeared at the G2E with a table felt for Play Four Poker that did not appropriate the
16 Four Card Poker Trade Dress. Ex. H, Conaway Aff. ¶¶ 7, 8.

17 **III. ARGUMENT**

18 To succeed on its preliminary injunction motion, Shuffle Master must show
19 “either (1) a combination of probable success on the merits and the possibility of
20 irreparable harm, or (2) the existence of serious questions going to the merits and the
21 balance of hardships tipping in its favor.” *Vision Sports, Inc. v. Melville Corporation*,
22 888 F.2d 609, 612 (9th Cir. 1989). This “formulation represents two points on the sliding
23 scale in which the required degree of irreparable harm increases as the probability of
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success decreases.” *General Motors Corp. v. Let’s Make a Deal*, 223 F.Supp.2d 1183, 1190 (D. Nev. 2002). Shuffle Master not only meets the first test, it surpasses it. Shuffle Master is likely to succeed on the merits and will most certainly face irreparable harm in the absence of a preliminary injunction that stops the sale of Defendants’ knock-off game.

A. Shuffle Master Is Likely To Succeed On The Merits Of Its Trade Dress Infringement Claim.

Trade dress “involves the total image of a product and may include features such as size, shape, color combinations, texture or graphics.” *Vision Sports*, 888 F.2d at 613. Shuffle Master claims that the Revised Awada Game infringes its trade dress in the inherently distinctive overall appearance of the Four Card Poker table game felt. To prevail on its infringement claim, Shuffle Master must prove three things: that the Four Card Poker Trade Dress is (1) protectable and (2) nonfunctional, and that (3) that there is a likelihood of confusion between the Four Card Poker Trade Dress and the Revised Awada Game. *General Motors*, 223 F.Supp.2d at 1195. *See also Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1258 (9th Cir. 2001). Shuffle Master easily meets this burden.

1. The Four Card Poker Trade Dress Is Protectable.

“Trade dress is protected if it is inherently distinctive or has acquired secondary meaning.”¹ *General Motors Corp.*, 223 F.Supp.2d at 1195. In this case, the Four Card

¹ If trade dress is claimed in a product design, as opposed to product packaging, it will only be protected upon a showing of secondary meaning. *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 216 (2000). The claimed trade dress here is a packaging trade dress, not product configuration trade dress, because it does not include the entire table itself, only the combination of elements on the felt that sits atop the table. *See, e.g., Urgent Gear, Inc. v.*

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1 Poker Trade Dress has both inherent distinctiveness and secondary meaning. First,
2 although some of the individual elements of the Four Card Poker Trade Dress may lack
3 distinctiveness on their own (*e.g.*, a circle design element), the innovative and arbitrary
4 combination of all of the elements together render the dress as a whole inherently
5 distinctive. *Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1120 (5th Cir.
6 1991), *aff'd*, 505 U.S. 763 (1992) (existence of individually non-distinctive elements
7 “does not eliminate the possibility of inherent distinctiveness in the trade dress as a
8 whole”); *Kendall-Jackson Winery Ltd. v. E&J Gallo Winery*, 150 F.3d 1042 (9th Cir.
9 1998) (relevant trade dress must not be dissected element by element; it must be
10 considered in its entirety); *General Motors*, 223 F. Supp. 2d at 1196 (“in trademark—and
11 especially trade dress cases—the mark must be examined as a whole, not by its
12 individual constituent parts”); *see also, e.g., Urgent Gear*, 2001 WL 1577395
13 (preliminary injunction granted; various tags, crests, slogans, warnings and a button-
14 down shirt in combination resulted in inherently distinctive trade dress); *AmBrit, Inc. v.*
15 *Kraft, Inc.*, 812 F.2d 1531, 1536-37 (11th Cir. 1987) (trade dress as a whole with its
16 combination of elements—“square size, bright coloring, pebbled texture, polar bear and
17 sunburst images, and distinctive style of printing”—was inherently distinctive).
18
19
20

21 The inherent distinctiveness of the Four Card Poker Trade Dress is evidenced by
22 the fact that for nearly four years, it has been unique and exclusive to Shuffle Master.
23 Competitors’ table games may share isolated elements with the Four Card Poker Trade
24

25 *Savoia, et al.*, No. 3:01-CV-2190-D, 2001 WL 1577395 at *3 (N.D. Tex. Dec. 10, 2001)
26 (combination of various tags, crests, slogans, warnings and a button-down shirt was
27 inherently distinctive “packaging” trade dress).
28

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1 Dress, but Shuffle Master is not aware of even one other table game felt that includes
2 each element in the same arbitrary combination as Shuffle Master—except of course for
3 the Defendants’ infringing Revised Awada Game. Ex. C, Scott Aff. ¶¶ 6, 7. *See Lisa*
4 *Frank, Inc. v. Impact International, Inc.*, 799 F.Supp. 980, 989 (D. Ariz. 1992). (“While
5 there are isolated similarities among the various products, they do not present an overall
6 image consistent with the LFI look.”).

8 Even if the Four Card Poker Trade Dress was not inherently distinctive, it would
9 still be protectable because it has achieved secondary meaning. Trade dress has
10 secondary meaning “if the purchasing public associates it with a specific producer or
11 source rather than with merely the product.” *General Motors Corp.*, 223 F.Supp.2d at
12 1195. The Ninth Circuit has identified several factors this Court may look to in
13 evaluating secondary meaning in the Four Card Poker Trade Dress, including: (1) the
14 length and manner of Shuffle Master’s use of the Four Card Poker Trade Dress; (2) the
15 exclusivity of that use; (3) the degree and manner of Shuffle Master’s Four Card Poker
16 advertising; (4) evidence of sales of Four Card Poker; and (5) Defendant’s intent to copy.
17 *General Motors Corp.*, 223 F.Supp.2d at 1195. *See also Sunburst Products, Inc. v.*
18 *Derrick Law Co., Ltd.*, No. 89-56025, 1991 WL 1523, at *3 (9th Cir. 1991). A final
19 factor is whether actual purchasers associate the Four Card Poker Trade Dress with
20 Shuffle Master. *Id.* Indeed, the Ninth Circuit has found that consumer surveys, though
21 not required, may provide “the most persuasive evidence of secondary meaning” in a
22 trade dress infringement suit. *Locomotor USA, Inc. v. Korus Co., Inc.*, 46 F.3d 1142,
23 1995 WL 7489, *7 (9th Cir. 1995) (unpublished); *see also Levi Strauss & Co. v. Blue*
24 *Bell, Inc.*, 778 F.2d 1352, 1358 (9th Cir. 1985).

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1 Application of the above factors indisputably shows that Shuffle Master has
2 acquired distinctiveness in its trade dress. With respect to the first two factors (length and
3 exclusivity of use), Shuffle Master has used the Four Card Poker Trade Dress
4 continuously and exclusively for nearly four years. Ex. C, Scott Aff. ¶ 6. Despite the
5 plethora of table games on the market during that time, none shared the appearance of the
6 Four Card Poker felt until the Defendants intentionally changed their felt design to mirror
7 Shuffle Master's in August 2005. Ex. C, Scott Aff. ¶¶ 6, 7. With respect to the third and
8 fourth factors (degree of advertising and evidence of sales), as noted above, Shuffle
9 Master has extensively advertised and promoted its trade dress and has made significant
10 "sales" of Four Card Poker by placing it more than 220 times in casinos across the
11 country (and abroad). Ex. E, Clark Aff. ¶¶ 10, 18, 19; Ex. A, TRO Snow Aff. ¶¶ 18-19.
12 Indeed, Defendants have admitted that "Shuffle Master is one of the largest suppliers of
13 poker table games in the marketplace," and that Four Card Poker is one "of the most
14 widely placed proprietary poker table games in the United States." Docket Entry 26,
15 Counterclaim ¶ 11.
16
17

18 With respect to the fifth factor, Defendants' intent, it is notable that Defendants
19 existed in the market with their own four card game and table felt design for years before
20 switching to a design identical to the Four Card Poker Trade Dress. Courts have noted
21 that proof of exact copying, like Defendants' here, can be sufficient to establish
22 secondary meaning as there is no logical reason for the precise copying save an attempt
23 to realize upon a prior user's secondary meaning. *See Adidas-Salomon AG v. Target*
24 *Corp.*, 228 F.Supp.2d 1192, 1209 (D. Or. 2002) (citing cases); *Time Inc. Magazine Co. v.*
25 *Globe Communications Corp.*, 712 F.Supp. 1103, 1108 (S.D.N.Y. 1989) ("in light of the
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1 prior Celebrity covers, which used an entirely different type, creating a very different
 2 cover format, one must ask why Celebrity changed its cover format to one that is
 3 virtually the same as that of People's.... Such imitation warrants a finding of intentional
 4 copying of trade dress."). As such, Defendants recent switch to a table felt design almost
 5 identical to Shuffle Master's and their "WHY PAY MORE?" promotional materials
 6 demonstrate Shuffle Master's strong secondary meaning.
 7

8 Adding to the weight of Shuffle Master's already persuasive evidence of acquired
 9 distinctiveness is that in a survey of table game managers (*i.e.*, casino personnel
 10 responsible for leasing or purchasing table games) from a cross-section of casinos in the
 11 United States, 35% associated the Four Card Poker game with a single source. Ex. F,
 12 Ostberg Dec. pp. 9, 10.² *See also* Ex. D, TRO Gatlin Aff. ¶ 4. Such a percentage of
 13 recognition is well within the level of association courts have found to be probative
 14 evidence of secondary meaning. *See Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d
 15 277 (7th Cir. 1998) (a recognition rate of 30% was sufficient for the purpose of staving
 16 off a summary judgment of no secondary meaning); *Zatarains, Inc. v. Oak Grove*
 17 *Smokehouse, Inc.*, 698 F.2d 786, 795 (5th Cir. 1983) (survey evidence of 23-28%
 18 recognition in the mark "Fish-Fri" for a fried fish coating product, coupled with the
 19 evidence of advertising and usage, tipped the scales in favor of a finding of secondary
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23 ² Noted survey expert Henry D. Ostberg of Admar Group Inc. conducted Shuffle Master's
 24 survey. Ostberg contacted table game managers at casinos nationwide, asking if they would
 25 participate in the survey. If they agreed, Ostberg sent them photographs of Shuffle Master's
 26 Four Card Poker game table felt. Ostberg then called the table game managers back and
 27 asked them a series of questions regarding the source of the table game shown in the
 28 photographs to determine if the Shuffle Master Trade Dress has secondary meaning. Ostberg's declaration, with its accompanying appendices, is attached hereto as Exhibit F.

1 meaning); *McNeil-PPC v. Granutec, Inc.*, 919 F.Supp. 198 (E.D.N.C. 1995) (where 41%
 2 of respondents associated red and yellow capsules with a single brand and 38% identified
 3 that brand as Tylenol, the court found sufficient evidence of secondary meaning);
 4 *Monsieur Henri Wines, Ltd. v. Duran*, 204 U.S.P.Q. 601 (TTAB 1979) (37% of
 5 interviewees associated brand with background design; probative to corroborate finding
 6 of strong trademark in the design).

8 2. The Four Card Poker Trade Dress Is Not Functional.

9 Trade dress is functional when the design of the dress “is essential to the use or
 10 purpose of the article,” if the design “affects the cost or quality of the article,” or if
 11 exclusive use of the dress by one party would “put competitors at a significant, non-
 12 reputation-related disadvantage.”³ *Clicks Billiards, Inc.*, 251 F.3d at 1258. In contrast,
 13 trade dress is **non-functional** if it is a composite of features that are “arbitrarily affixed or
 14 included for aesthetic purposes.” *General Motors*, 223 F. Supp. 2d at 1196. In
 15 evaluating functionality, the Ninth Circuit has emphasized that it is “crucial” that courts
 16 “focus not on the individual elements, but rather on the overall visual impression that the
 17 combination and arrangement of those elements create.” *Clicks Billiards*, 251 F.3d at
 18 1259. As such, the Ninth Circuit has identified four factors to consider in determining
 19 whether trade dress is functional: (1) whether the design yields a utilitarian advantage,
 20
 21

23 ³ The Ninth Circuit only recognizes utilitarian functionality and has not adopted so-called
 24 “aesthetic functionality.” *Clicks Billiards*, 251 F.3d at 1260. *See also First Brands Corp. v.*
 25 *Fred Meyer, Inc.*, 809 F.2d 1378, 1382 n. 3 (9th Cir. 1987) (“In this circuit, the ‘aesthetic’
 26 functionality test has been limited, *Vuitton et Fils S.A. v. J. Young Enters., Inc.*, 644 F.2d 769,
 27 773 (9th Cir. 1981), if not rejected, *Fabrica, Inc. v. El Dorado Corp.*, 697 F.2d 890, 895 (9th
 28 Cir. 1983), in favor of the ‘utilitarian’ functionality test.”). Thus Shuffle Master does not
 address aesthetic functionality in this brief.

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1 (2) whether alternative designs are available, (3) whether advertising touts the utilitarian
2 advantages of the design, and (4) whether the particular design results from a
3 comparatively simple or inexpensive method of manufacture.” *Clicks Billiards*, 251 F.3d
4 at 1260 (internal quotations omitted).

5 Applying each of these four factors to the overall impression of the Four Card
6 Poker Trade Dress leads to the inescapable conclusion that the Four Card Poker Trade
7 Dress is not functional. **First**, and foremost, Shuffle Master’s trade dress does not yield a
8 utilitarian advantage. Instead, Shuffle Master’s Four Card Poker table felt designer chose
9 design elements that would combine to create a distinctive visual appearance. Ex. B,
10 Snow Aff. ¶¶ 7, 9 . The designer could have chosen any number of different elements
11 and still have presented Shuffle Master with a table felt appropriate for use with a poker
12 game using the same rules of play. Ex. B, Snow Aff. ¶ 8. In other words, the purpose of
13 the game did not dictate the design.
14

15
16 **Second**, there are nearly limitless alternative designs for specialty table game
17 felts. Ex. B, Snow Aff. ¶ 8; Ex. C, Scott Aff. ¶¶ 6, 7. That is powerful evidence that the
18 Four Card Poker Trade Dress is not functional. *General Motors Corp.*, 223 F.Supp.2d at
19 1196 (finding vehicle trade dress non-functional and explaining “there are ample
20 alternative designs available to defendants as evidenced by the current size of the sports
21 utility vehicle market”). *Clicks Billiards*, 251 F.3d at 1261 (“Clicks, we conclude,
22 presented sufficient evidence of the arbitrariness and non-functional nature of its design
23 decisions and the availability of alternative designs to clear the summary judgment
24 hurdle.”) Simply put, because the “Defendants have available to them a multitude of
25 design alternatives that can be utilized in an endless number of combinations [they] can
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1 effectively compete in the market without simulating the [Shuffle Master] trade dress.”
2 *Lisa Frank, Inc. v. Impact International, Inc.*, 799 F.Supp. 980, 987. The existence of
3 alternative designs supports a finding of non-functionality.

4 **Third**, in advertisements and promotions, Shuffle Master does not tout the felt for
5 Four Card Poker as having any utilitarian benefits; it does not have any such benefits.
6 *See* Ex. E, Clark Aff. ¶ 20. Instead, the promotional materials highlight the appearance
7 of the felt but tout only the popularity of the game based on the rules of play and
8 frequency of wins. *See* Ex. E, Clark Aff. ¶¶ 10, 11, 15.

9
10 **Fourth**, the overall design selected by Shuffle Master’s designer and used by
11 Shuffle Master for the past four years is not any easier or cheaper to make than any other
12 felt design. Ex. B, Snow Aff. ¶ 9. This is established by the fact that shortly after this
13 Court’s entry of a TRO, the Defendants appeared at the G2E with a felt design for their
14 Play Four Poker that did not appropriate the distinctive overall appearance of Shuffle
15 Master’s Four Card Poker Trade Dress. Ex. H, Conaway Aff. ¶¶ 7, 8.

16
17 **3. The Defendants’ Table Game Creates A Likelihood Of**
18 **Confusion.**

19 Likelihood of confusion is the “most important element” of the three components
20 of a successful trade dress infringement claim. *Clicks*, 251 F.3d at 1264. A likelihood of
21 confusion exists when the similarity of the parties’ dress is likely to confuse customers
22 about the source of the products. *Brookfield Communications, Inc. v. West Coast*
23 *Entertainment Corp.*, 174 F.3d 1036, 1053 (9th Cir. 1999). In other words, confusion is
24 likely here if those viewing Defendants’ accused Play Four Poker trade dress will
25 probably assume that Play Four Poker is somehow associated with Shuffle Master.
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1 *Clicks*, 251 F.3d at 1265. In evaluating whether there is a likelihood of confusion, courts
2 must look to the “total image of a product,” *Vision Sports, Inc.*, 888 F.2d at 613—*i.e.*, the
3 “total effect of the defendant’s product and package on the eye and mind of an ordinary
4 purchaser.” *First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378, 1384 (9th Cir. 1987).

5
6 Analysis of likelihood of confusion in a Lanham Act trade dress infringement
7 case involves consideration of several factors, often referred to in the Ninth Circuit as the
8 “Sleekcraft factors”: (1) similarity of the parties’ trade dress; (2) similarity of the parties’
9 goods and services; (3) marketing channels used; (4) the alleged infringer’s intent in
10 selecting the accused trade dress; (5) strength of the protected trade dress; (6) the type of
11 goods and degree of care exercised by purchasers; (7) evidence of actual confusion; and
12 (8) likelihood of expansion of the product lines. *See Brookfield*, 174 F.3d at 1054
13 (referring to eight “Sleekcraft factors” and granting preliminary injunction); *see also*
14 *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979) (identifying factors in
15 trademark infringement context); *Vision Sport*, 888 F.2d at 616 (holding that same factors
16 are to considered in trade dress infringement case).

17
18 In considering Shuffle Master’s motion for a preliminary injunction, this Court is
19 not required to consider all eight of the Sleekcraft factors. *Apple Computer, Inc. v.*
20 *Formula Int’l Inc.*, 725 F.2d 521, 526 (9th Cir. 1984) (noting that in granting a
21 preliminary injunction, the parties will not have had sufficient opportunity to fully
22 develop and present their cases, and the court will have only a brief opportunity to
23 examine the *Sleekcraft* factors) (internal citations omitted). Nevertheless, even at this
24 early stage of the case, it is clear that a majority of the likelihood of confusion factors
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1 weigh in favor of Shuffle Master, establishing that Shuffle Master is highly likely to
2 succeed on the merits.

3 *a. Defendants' Infringing Trade Dress is Virtually Identical*
4 *to Shuffle Master's.*

5 Certain of the Sleekcraft factors are "much more important than others," and
6 while it is therefore possible to reach a conclusion with respect to likelihood of confusion
7 after considering only a "subset of the factors," the similarity of the parties' trade dress
8 "will always be an important factor." *Brookfield*, 174 F.3d at 1054. In considering this
9 factor, the trade dress at issue must be considered in its entirety and as it is encountered
10 in the marketplace. *Id.*

11 In this case, a simple visual comparison of the parties' games shows that the
12 layout of the Revised Awada Game is nearly identical to that of Shuffle Master's Four
13 Card Poker Game in detail and appearance. Ex. G, TRO Conaway Aff. ¶¶ 4, 5; Ex. A,
14 TRO Snow Aff. ¶¶13-15. Furthermore, the layout of the text on the Revised Awada
15 Game, including the font and the placement of design elements, is identical to Shuffle
16 Master's Four Card Poker. Specifically:

- 19 • The wording for the Layout on the Revised Awada Game, "Aces Up," is
20 identical to the wording on Four Card Poker;
- 21 • The term "Automatic Bonus," and phrase "Automatic Bonus is paid on
22 Ante Wager," both previously unique to Four Card Poker, now each
23 appear on the Revised Awada Game;
- 24 • Four Card Poker has a pay table next to the dealer for the dealer's benefit,
25 and this same pay table layout now appears on the Revised Awada Game;
- 26 • The layout on the Four Card Poker felt ***contains 2 printer's errors***: the
27 words "Aces Up" and "Play 1x to 3x Ante" were not completely printed
28 within their respective circles on the Four Card Poker layout. The ***Revised Awada Game contains these identical errors.***

1 The only difference between the Revised Awada Game and Shuffle Master's Four
2 Card Poker Game is that the displayed odds for "3 of a kind" are slightly different—8 to
3 1 vs. 7 to 1. Ex. A, TRO Snow Aff. ¶ 14. But the law is clear that such "trivial
4 distinctions" are unimportant when two products are otherwise "glaringly similar."
5 *GoTo.com, Inc. v. The Walt Disney Co.*, 202 F.3d 1199, 1206 (9th Cir. 2000).
6 Furthermore, when considering this Sleekcraft factor, similarities are always weighed
7 more heavily than differences. *Id.* This first factor thus weighs strongly in favor of
8 Shuffle Master.

10 ***b. The Parties' Goods and Services are Identical.***

11 This factor, which seeks to determine whether the parties directly compete, is
12 another Sleekcraft factor that is "always" important. *Brookfield*, 174 F.3d at 1054-55;
13 *GoTo.com*, 202 F.3d at 1206 (relatedness of goods is a "controlling Sleekcraft
14 consideration"). The law recognizes that competitive, related goods and services are
15 more likely than unrelated goods to confuse the public. *Brookfield*, 174 F.3d at 1055;
16 *AMF*, 599 F.2d at 350. For this reason, the Ninth Circuit has held that when virtually
17 identical trade dress is used in connection with identical products or services, "likelihood
18 of confusion [will] follow as a matter of course." *Id.* at 1056 (emphasis added), citing
19 *Lindy Pen Corp. v. Bic Pen Corp.*, 796 F.2d 254, 256-57 (9th Cir. 1986) (finding likely
20 confusion based solely on similarity of the marks and products, even though the six other
21 likelihood of confusion factors all weighed against a finding of likelihood of confusion).

22 In this case, Defendants have ***admitted*** that the parties are direct competitors
23 offering identical products. Docket Entry 26, Counterclaim ¶ 7; *see General Motors*, 223
24 F. Supp. 2d at 1193 (identical products are "related goods"), quoting *AMF*, 599 F.2d at

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1 348 n. 10. Furthermore, the evidence in this case establishes that the Defendants have
2 made at least four attempts to sway Shuffle Master's customers to switch from Four Card
3 Poker to the Revised Awada Game. Ex. I, TRO Konicek Aff. ¶ 3-6; Ex. A, TRO Snow
4 Aff. ¶¶ 8-10. There can be no more convincing evidence that the parties' games are
5 related and directly competitive than that the Defendants have offered their own game as
6 a cheap replacement for Shuffle Master's Four Card Poker Game, including by
7 advertising it with the slogan "Why Pay More? Same Rules As Our Competitor's 4 Card
8 Poker Game \$300!!!." Ex. H, Conaway Aff. ¶¶ 4, 5. This factor supports a likelihood of
9 confusion.
10

11 ***c. The Parties Use Identical Marketing Channels.***

12 This factor, together with relatedness of goods and services and similarity of the
13 trade dress, make up "the controlling troika" or "most crucial body of the Sleekcraft
14 analysis." *GoTo.com*, 202 F.3d at 1205, 1207. Although Defendants have no marketing
15 plan, they have admitted that they intend "to market the game anywhere that there is
16 casino table gaming." Ex. J, Defendants' Responses to Shuffle Master's First
17 Interrogatories No. 4; Ex. K, Defendants' Response to Shuffle Master's First Requests
18 for Production No. 7. Defendants' intent to market to casinos is further evidenced by
19 their presence at the G2E. Shuffle Master also participates in gaming shows, including
20 the G2E, to market its products to casinos. Ex. E, Clark Aff. ¶ 3. Furthermore, Shuffle
21 Master markets its games in part by maintaining direct communication with casino
22 personnel, and the Defendants have similarly directly contacted various casinos in an
23 effort to convince them to substitute the Revised Awada Game for Shuffle Master's Four
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1 Card Poker Game. Ex. I, TRO Konicek Aff. ¶¶ 3-6; Ex. A, TRO Snow Aff. ¶¶ 8-10.

2 Thus this factor again weighs heavily in favor of Shuffle Master.

3 ***d. Defendants Intended Their Play Four Poker Game to Be***
 4 ***Associated or Confused with Shuffle Master's Four Card***
 5 ***Poker Game.***

6 If an accused infringer knowingly adopts a mark similar to another's, "courts will
 7 presume that it can achieve its purpose in deceiving the public." *Caesars World, Inc. v.*
 8 *Milanian*, 247 F. Supp. 2d 1171, 1200 (D. Nev. 2003) (emphasis added), citing *AMF*, 599
 9 F.2d at 354. To swing this factor its way, Shuffle Master is not required to show bad acts
 10 by the defendant; it need merely establish that the Defendants adopted a similar trade
 11 dress with actual or constructive knowledge of Shuffle Master's Four Card Poker Trade
 12 Dress. *Brookfield*, 174 F.3d at 1059 ("This factor favors the plaintiff where the alleged
 13 infringer adopted his [trade dress] with knowledge, actual or constructive, that it was
 14 another's") (internal citations omitted). The Defendants were aware of Shuffle Master's
 15 Four Card Poker dress, given Shuffle Master's strong reputation in the gaming industry
 16 and the popularity of the Four Card Poker Game, which Shuffle Master has marketed for
 17 the past four years. Ex. D, TRO Gatlin Aff. ¶ 4; Ex. A, TRO Snow Aff. ¶ 19. That fact,
 18 when coupled with the striking similarity of the parties' trade dress, is enough to infer
 19 that the Defendants intended to cause confusion. *See K-Swiss, Inc. v. USA Aisiqui Shoes,*
 20 *Inc.*, 291 F. Supp. 2d 1116, 1125 (C.D. Cal. 2003) (intent to confuse consumers may be
 21 inferred where the plaintiff has a "strong reputation" and the trade dresses are very
 22 similar).

23 The most "damning" evidence that the Defendants intended for their game to be
 24 associated with Shuffle Master's is that after years on the market with the Original
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1 Awada Game, Defendants redesigned the game to make it nearly indistinguishable from
2 Shuffle Master's Four Card Poker table game. *See Ocean Garden, Inc. v. Marktrade Co.,*
3 *Inc.*, 953 F.2d 500, 507 (9th Cir. 1991) (finding intent to be "the most damning element"
4 against defendant, where it was shown that defendant changed its original "very
5 distinguishable" trade dress to mimic plaintiff's trade dress, and affirming grant of
6 preliminary injunction).

7
8 "A showing that defendant intended to copy plaintiff's trade dress is entitled to
9 substantial weight." *Vision Sports*, 888 F.2d at 616. Thus, if similar trade dress is
10 adopted with the intent of deriving "benefit from the reputation of the plaintiff, that fact
11 alone may be sufficient to justify the inference that there is confusing similarity." *First*
12 *Brands*, 809 F.2d at 1385 (defendant's intent in adopting trade dress is a "critical factor")
13 (emphasis added); *see also Pacific Telesis v. Int'l Telesis Comms.*, 994 F.2d 1364, 1369
14 (9th Cir. 1993) (same; upholding injunction where district court found that the defendant
15 intended to "benefit from the goodwill and reputation acquired by [the plaintiff]");
16 *General Motors*, 223 F. Supp. 2d at 1194 (factor weighed in favor of confusion where
17 defendant "desired to link [its] product to plaintiff's in order to attract buyers"). Because
18 the Defendants acted with intent that the public would replace Shuffle Master's Four
19 Card Poker with the Revised Awada Game, this factor by itself is probably enough to
20 establish a likelihood of confusion. *First Brands*, 809 F.2d at 1385. When viewed in
21 tandem with the three previously-discussed Sleekcraft factors, a likelihood of consumer
22 confusion is inescapable.
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e. Shuffle Master Has a Strong Trade Dress.

When the products at issue are closely related and the accused trade dress is nearly identical, as here, the strength of the Plaintiff's trade dress is "of diminished importance in the likelihood of confusion analysis." *Brookfield*, 174 F.3d at 1058 (holding that while the Plaintiff's mark fell "on the weak side of the spectrum," a likelihood of confusion was nonetheless compelled in light of the similarity between the parties' products and marks), citing 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 11:76 (4th ed. 1998) ("Whether a mark is weak or not is of little importance where the conflicting mark is identical and the goods are closely related"). Nevertheless, Shuffle Master has introduced credible evidence that its Four Card Poker Trade Dress is strong and distinctive. *See* Section III.A.1., *infra*; Ex. D, TRO Gatlin Aff. ¶ 4 (observing that Four Card Poker is "well known among casinos in Nevada" and "associated" with Shuffle Master); Ex. A, TRO Snow Aff. ¶¶ 18-19 (noting reputation of game, revenue produced by it, and marketing expenses incurred in promoting it). This factor weighs in favor of Shuffle Master.

f. Degree of Care.

When assessing the likelihood of confusion, the standard used by the courts is that of the "typical buyer exercising ordinary caution." *AMF*, 599 F.2d at 353. While the average purchaser of a product is expected to be "more discerning—and less easily confused—when he is purchasing expensive items," the Ninth Circuit has recognized that "confusion may often be likely even in the case of expensive goods sold to discerning customers." *Brookfield*, 174 F.3d at 1060. Indeed, the degree of care factor is overshadowed where, as here, other factors weigh strongly in favor of a likelihood of

1 confusion. *See, e.g., Pacific Telesis*, 994 F.2d at 1369 (degree of care unimportant where
 2 “considered as a unity, the constellation of facts found by the district court coheres in the
 3 ultimate factual finding of likelihood of confusion”); *The Morningside Group Ltd. v.*
 4 *Morningside Capital Group, LLC*, 182 F.3d 133, 143 (2nd Cir. 1999) (“[i]t is clear in all
 5 events that when, as here, there is a high degree of similarity between the parties’
 6 services and marks, the sophistication of the buyers cannot be relied on to prevent
 7 confusion”) (internal citations and quotations omitted). This factor weighs slightly in
 8 favor of Shuffle Master.
 9

10 ***g. Actual Confusion and Likelihood of Expansion Are Not***
 11 ***Relevant Here.***

12 The last two Sleekcraft factors do not merit extensive discussion because they are
 13 irrelevant to this case at this time. *General Motors*, 223 F. Supp. 2d at 1194 (finding
 14 these factors “minor considerations”). First, actual confusion is not relevant here because
 15 Shuffle Master promptly brought this suit as soon as the Defendants introduced their
 16 infringing Revised Awada Game into the market. *See Brookfield*, 174 F.3d at 1060
 17 (finding actual confusion irrelevant under similar circumstances); *see also Caesars*, 247
 18 F. Supp. 2d at 1199 (noting that a requirement of actual confusion “where there has been
 19 insignificant commercial activity by the infringer would work to penalize the trademark
 20 owner for taking prompt steps to protect his/her rights”). Second, the “likelihood of
 21 expansion in product lines factor is relatively unimportant where [as here] two companies
 22 already compete.” *Brookfield*, 174 F.3d at 1060.
 23
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1 **B. Shuffle Master Will Be Irreparably Harmed In The Absence Of A**
2 **Preliminary Injunction.**

3 In trademark infringement cases, irreparable injury is ordinarily presumed once
4 the plaintiff has established a likelihood of confusion. *See El Pollo Loco, Inc. v. Hashim*,
5 316 F.3d 1032, 1038 (9th Cir. 2003) (affirming preliminary injunction); *International*
6 *Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 827 (9th Cir. 1993); *Vision Sports,*
7 *Inc. v. Melville Corp.*, 888 F.2d 609; *General Motors Corp.*, 223 F.Supp.2d at 1196-97.
8 Given the strength of Shuffle Master's showing on the merits of its case, irreparable harm
9 should be presumed.

10 Nonetheless, Shuffle Master can demonstrate irreparable harm even absent a
11 presumption. If Defendants are permitted to continue marketing their cheap
12 substitutions, Shuffle Master will likely lose business and business opportunities, and its
13 reputation will be harmed—why would casinos lease or purchase both Shuffle Master's
14 and Defendants' game tables when the tables look nearly identical and Defendants offer
15 theirs at bargain basement prices? *Radical Products, Inc. v. Sundays Distributing*, 821 F.
16 Supp. 648, 651 (W.D. Wash. 1992). On the flipside, the Defendants' unfair acts—
17 offering identical copies of Shuffle Master's game, hyping those knock-offs as less than
18 1/3 the price—will furnish Defendants with undeserved market contacts and business.
19 Put another way, it is Shuffle Master who created the demand for Four Card Poker, and
20 now that gaming consumers want to play that game and casinos therefore want to offer it,
21 Defendants hope to ride Shuffle Master's coattails, supplanting Shuffle Master's game
22 with their copycat, cut-rate game. The resulting harm to Shuffle Master simply could not
23 be repaired. *Rubbermaid Commercial Products, Inc. v. Contico Intern., Inc.*, 836 F.Supp.
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1 1247, 1257 (W.D. Va. 1993) (preliminary injunction granted against trade dress infringer
2 where “[t]he contacts [defendant] could build in the market pending the outcome of this
3 case would likely endure even if this court ultimately decided permanently to enjoin
4 [defendant].... That is a harm this court would be without power to repair.”)

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6 **C. The Defendants’ Design-Around Felt Does Not Moot Shuffle Master’s
Requested Relief.**

7 As soon as this Court entered a TRO against the Defendants infringing activities,
8 the Defendants appeared at the G2E with a re-designed table felt for their Play Four
9 Poker game table. Ex. H, Conaway Aff. ¶¶ 7,8. Shuffle Master anticipates that the
10 Defendants will attempt to avoid a preliminary injunction, in part, by arguing to this
11 Court that they have voluntarily ceased their infringing behavior. But in the absence of a
12 preliminary injunction, there is nothing to prevent Defendants from returning to their
13 infringing table felt, and courts have repeatedly held that a voluntary cessation of
14 infringement does not moot the need for injunctive relief. *H.O. Sports Inc. v. Earth &*
15 *Ocean Sports Inc.*, 57 U.S.P.Q.2d 1927 (W.D. Wash. 2001) (preliminary injunction
16 granted even when defendant voluntarily ceases infringing activities since voluntarily
17 cessation is not ground for denial of injunction); *Ford Motor Co. v. Lapertosa*, 126 F.
18 Supp. 2d 463 (E.D. Mich. 2000) (preliminary injunction awarded against adverse use of
19 domain name despite defendant’s cessation of conduct); *Malaytex USA, Inc. v. Colonial*
20 *Surgical Supply, Inc.*, 44 U.S.P.Q.2d 1291 (N.D. Cal. 1997) (preliminary injunction
21 issues despite defendant’s proffered cessation of offending practices); *Lon Tai Shing Co.*
22 *v. Koch + Lowy*, 19 U.S.P.Q.2d 1081, 1109 (S.D.N.Y. 1990) (bare promise to forebear
23 enjoined conduct not basis for denial of injunctive relief). Further, Shuffle Master
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1 offered to resolve the need for this briefing and argument upon Defendants' stipulation
 2 that it would agree to cease marketing/selling its offensive table felt—Defendants
 3 refused. Thus, this issue is ripe for determination.

4 **IV. CONCLUSION**

5 For the foregoing reasons, Shuffle Master respectfully requests that this Court
 6 enter an Order preliminarily enjoining Defendants from making or selling infringing table
 7 games otherwise deceptively or unfairly competing with Shuffle Master.
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9 * * *

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 11 RESPECTFULLY SUBMITTED this 27th day of February, 2006.

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 14 /

15 **JONES VARGAS**

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 27th day of February, 2006 and pursuant to FRCP 5(b), I served via electronic service and/or deposited for mailing in the U.S. Mail a true and correct copy of the foregoing Shuffle Master's Memorandum in Support of its Motion for Preliminary Injunction, postage prepaid and addressed to:

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